

CERTIFIED FOR PARTIAL PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SCOTT BOWEN et al.,

Plaintiffs and Appellants,

v.

ZIASUN TECHNOLOGIES, INC.,

Defendant and Respondent.

D041142

(Super. Ct. Nos. GIC762921 &
GIC772344)

ORDER MODIFYING OPINION
AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

On the court's own motion it is ordered that the opinion filed herein on March 8, 2004, be modified as follows:

1. At the end of the first paragraph on page 19, after the sentence ending "section 17200 should also not reach such transactions," add as footnote 9 the following footnote, which will require renumbering of all subsequent footnotes:

It is true that section 17200 addresses not only unfair or deceptive business practices, but "unlawful" ones as well, while section 5 of the FTC Act and other states' similar statutes do not. However, this fact does not change the result. Even after the term "unlawful" was added to former Civil Code section 3369 (the predecessor to § 17200) in 1963, cases interpreting that section and its term "unlawful" continued to rely on the FTC Act for guidance. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 109-110 [construing term "unlawful" broadly and declaring FTC Act's

provisions to be "parallel broad proscription[s]").) There is nothing to indicate that the Legislature, in adding the term "unlawful" in 1963, sought to take former Civil Code section 3369 outside the parameters of the FTC Act. (See Stern, Bus. & Prof. Code § 17200 Practice (The Rutter Group 2003) ¶ 2:26, p. 2-7.) Further, there is no rational reason that the addition of the term "unlawful" should negate federal and out-of-state cases that hold that section 5 of the FTC Act and similar state statutes do not apply to securities transactions. Securities transactions could also be considered "unfair" or "fraudulent" business practices under section 5 of the FTC Act or section 17200. The terms "unfair" or "fraudulent" are actually much *broader* than the term "unlawful." Thus, unfair or fraudulent practices in securities transactions could meet the statutory definition and be in violation of either section 17200 or the FTC Act without having to be considered "unlawful." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, *supra*, 20 Cal.4th at p. 180.) However, despite the fact that both the FTC Act and state statutes such as section 17200 would on their face appear to reach securities transactions, the FTC, federal courts, and state courts interpreting their own unfair competition statutes have held that securities transactions are exempt. The reasoning is not that they do not meet the definition of "unfair" or "fraudulent," but that section 5 of the FTC Act and similar state statutes were never intended to apply to securities transactions *at all* because of the comprehensive regulatory umbrella of the Securities and Exchange Commission over such transactions. (*Russell*, *supra*, 510 A.2d at p. 977; *Spinner*, *supra*, 849 F.2d at p. 391.)

2. At the end of the first full paragraph on page 20, add as footnote 10 the following footnote, which will require renumbering of all subsequent footnotes:

In dicta in a footnote the *Roskind* court also attempted to distinguish the *Spinner* court's decision that Hawaii's little FTC Act did not apply to securities transactions on the basis that section 17200 "[h]as always been given a broad and sweeping" interpretation and because section 17200 "contains no language supporting an exclusion for securities, and under the plain language of [section 17200], we cannot create such an exclusion." (*Roskind*, *supra*, 80 Cal.App.4th at p. 355, fn. 8.) However, this statement in *Roskind* ignores the fact that courts in this state have consistently treated section 17200 as a "little FTC Act" and have relied upon section 5 of the FTC Act to provide guidance as to its scope. In fact, in *Cel-Tech*

Communications, Inc. v. Los Angeles Cellular Telephone Co, *supra*, 20 Cal.4th at p. 185 (cited by the *Roskind* court in distinguishing *Spinner*), the California Supreme Court expressly relied upon federal precedent in interpreting section 17200, calling section 5 of the FTC Act "parallel" to section 17200. In doing so, the majority also rejected Justice Kennard's dissenting opinion in that case that section 17200 was not a little FTC Act and that federal cases were not persuasive in interpreting section 17200. (*Cel-Tech*, *supra*, 20 Cal.4th at p. 181, fn. 9; see *id.* at pp. 196-197, fn. 2 (conc. & dis. opn. of Kennard, J.)

There is no change in the judgment.

Plaintiffs' petition for modification and rehearing is denied.

NARES, Acting P. J.